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SERVICE DATE - JULY 20, 2001

SURFACE TRANSPORTATION BOARD[1]

DECISION

Finance Docket No. 32821

BAR ALE, INC.
v.
CALIFORNIA NORTHERN RAILROAD CO. AND
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: July 18, 2001

This complaint proceeding involves the embargo of a rail line in Petaluma, CA, that served the former facilities of complainant Bar Ale, Inc. (Bar Ale). The embargo was placed on the line by California Northern Railroad Company (CNR), which operated the line under a lease from Southern Pacific Transportation Company (SP). In its complaint, Bar Ale alleges that the embargo was unlawful and requests damages from defendants, CNR and Union Pacific Railroad schedule established in a decision served on February 5, 1998.[2] Company (UP), successor in interest to SP.[3] The parties filed statements pursuant to a procedural

[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and which took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10903(a) and 11101(a). Therefore, this decision applies the law in effect prior to the ICCTA.

[2] Due to discovery disputes, the filing of evidence under a prior procedural schedule was delayed and that schedule was eventually vacated and replaced by the current one, under which complainant filed its opening statement on April 1, 1998, CNR and UP filed separate reply statements on May 1, 1998, and Bar Ale filed separate rebuttal statements to the replies on May 21, 1998.

[3] UP has acquired SP's interest in the line pursuant to the Board's decision in Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996).

(continued...)

MOTION TO STRIKE

Because Bar Ale's opening statement was not verified in accordance with the Board's regulations, UP moves to strike all unverified assertions of fact in the statement and seeks dismissal of the complaint for failure to present a prima facie case.

Bar Ale counters that substantially all of the evidence it relied upon in its opening statement either was supplied by defendants in response to interrogatories or was supported by exhibits attached to Bar Ale's opening statement.[4] Bar Ale maintains that it was under no obligation to verify information provided by defendants and that defendants should be precluded from challenging information that they themselves provided in response to discovery requests.

We will deny UP's motion to strike. Almost all of the information contained in complainant's opening statement is corroborated either through reference to documents provided by the parties or through information provided by UP or CNR in discovery. We will not accord any weight to disputed factual allegations[5] that are not directly supported by the record.

BACKGROUND

Bar Ale is a manufacturer, wholesaler and retailer of livestock feed and related supplies. It owned and operated a milling plant in Petaluma, CA, which was scheduled to be torn down shortly after April 1, 1998.[6] Bar Ale received inbound shipments of various agricultural commodities[7] by rail to its former Petaluma plant, which was located on First Street at the end of

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[3](...continued)

[4] Bar Ale prefaced many of its factual assertions in the opening statement with "[t]here is no dispute."

[5] UP submits that Bar Ale's "so-called" undisputed facts are disputed.

[6] Bar Ale's new facility is located in Williams, CA.

[7] Bar Ale states that it received 121 carloads in 1992 and 70 carloads from January 1, 1993, through November 11, 1993. CNR reports the carload figures as 120 and 69, respectively.

the Water Street Line,[8] approximately 4,000 feet from the main line. Bar Ale was the only industry served by the line at the time of the embargo.

The Water Street Trestle, also known as the Old Wharf Bridge, is located at approximately milepost 38.5 on the Water Street Line, between Western Avenue and First Street. It is an open deck timber trestle, approximately 425 feet long, flanked on one side by a floating concrete boat dock and on the other side by a waterfront restaurant. The restaurant apparently uses portions of the trestle for access and as a patio.

CNR agreed to operate this and other lines[9] at the request of SP, which was seeking a substitute operator to facilitate the sale of these lines to a consortium of public entities including Marin County, Sonoma County, the Golden Gate Bridge, Highway and Transportation District, and the North Coast Railroad Authority (NCRA) (collectively, Public Entities). On August 27, 1993, CNR entered into two lease agreements with SP, under which CNR leased approximately 354 miles of track from SP.[10] One of the leases was for the operation by CNR of the NWP lines, including the Water Street Line (the NWP lease).[11] CNR began operations over the NWP lines on September 26, 1993.

Prior to entering into the lease arrangements with SP, CNR hired an independent firm, Summit/Lynch Consulting Engineers, Inc. (Summit/Lynch), to inspect the tunnels and bridges on the NWP lines, including the condition of the Old Wharf Bridge. In a July 16, 1993 engineering report, Summit/Lynch concluded that, even with the existing 110-ton load limitation and the restrictions on locomotive use, the bridge was in such poor condition and presented such a risk to

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[8] Referred to in the record variously as the Water Street Spur, SPTC track number 310, and SPTC track number 315.

[9] These lines were formerly lines of the Northwestern Pacific Railroad Company, a subsidiary of SP, and are referred to by the parties to this proceeding as the NWP lines.

[10] The lease arrangement was approved in California Northern Railroad Company Limited Partnership – Lease and Operation Exemption – Certain Lines of Southern Pacific Transportation Company, Finance Docket No. 32353 (ICC served Oct. 5, 1993).

[11] Under the NWP lease, CNR operated as a designated switch carrier for SP. SP established rates and terms of service for the industries served by CNR (except for purely local moves on the leased lines and traffic interchanged to third parties, for which CNR established the rates), and CNR received a per car allowance for each loaded car it handled.

the public and train crews that further train operations over the bridge should cease until repairs, estimated at more than $250,000, were made.[12]

In a letter dated July 22, 1993, CNR informed SP of the poor condition of the Old Wharf Bridge, as confirmed by the Summit/Lynch report, and stated that CNR would not operate over the bridge in that condition.[13] In a letter to CNR dated August 27, 1993, SP agreed to embargo the Water Street Line prior to the commencement date for freight operations under the lease agreement (on or before September 30, 1993).[14]

Subsequently, SP's Engineering Department made a visual inspection of the bridge and did a structural analysis, and found no immediate hazard to continued use of the bridge. Accordingly, SP took the position that it could not lawfully embargo the bridge and, by letter dated October 4, 1993, informed CNR that it (CNR) would have to make the determination as to whether to file an embargo.[15]

Given the conflicting findings, CNR obtained another engineering opinion from a second independent firm, the Sverdrup Corporation (Sverdrup), that confirmed the Summit/Lynch findings.[16] Based on evidence of advanced decay and signs of structural distress, Sverdrup recommended that "the bridge be closed immediately because it poses enormous risks to the public and the train crews."[17]

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[12] In assessing the various parts of the bridge, the Summit/Lynch report found that the bents were not plumb and were out of alignment, some piles were rotten and others were marginal, the caps appeared to be soft, the sway bracing was ineffectual, and the stringers, although not appearing to be in as poor condition as the bents, were suspect. See CNR's Reply, Exhibit C.

[13] See Bar Ale's Opening Statement, Exhibit F.

[14] See Bar Ale's Opening Statement, Exhibit I. The letter confirmed certain understandings between SP and CNR regarding their lease agreement entered into on the same date.

[15] See Bar Ale's Opening Statement, Exhibits J and K.

[16] In a letter to SP dated October 26, 1993, CNR characterizes the findings of Sverdrup as more ominous than the findings of Summit/Lynch. See Bar Ale's Opening Statement, Exhibit L.

[17] Evidence of advanced decay included: rust stains; fungus fruiting; sunken and split surfaces; and the presence of insects. Signs of structural distress included: bents out of plumb and alignment; disconnected joints; ripped sway bracing; and cracked members. See CNR's Reply, Exhibit D.

Accordingly, on November 18, 1993, less than 2 months after it began operations, CNR filed an embargo notice[18] with the Association of American Railroads (AAR) for the line of track leading to Bar Ale, citing unsafe bridge conditions. In the embargo notice, CNR stated that it would accept traffic destined for Bar Ale on the Petaluma team track (SPTC track number 276). That public team track is located a few blocks from Bar Ale's former plant.

Immediately before the imposition of the embargo, representatives of CNR, Bar Ale, and the SP Grain Marketing Group met to discuss prospective service and compensation to Bar Ale for transloading on the Petaluma team track. SP offered to pay a $100 per car allowance to compensate Bar Ale for transloading. Bar Ale considered this amount to be too low.[19]

In lieu of using the Petaluma team track, Bar Ale made arrangements with its competitor, Dairymen's Feed Supply and Cooperative (Dairymen), to transload Bar Ale shipments at Dairymen's facility, which is located approximately one mile away from Bar Ale's former Petaluma plant.[20] After the embargo was in place, until the line was sold, CNR delivered all cars destined for Bar Ale to the Dairymen's facility, where Bar Ale received 96 carloads in 1994, 66 carloads in 1995, and 22 carloads in 1996 (through July 22). Bar Ale continued to request direct rail service over the Water Street Line and contacted the ICC for assistance. By letter dated April 12, 1995, the ICC's Office of Compliance and Enforcement (OCE) outlined various options to CNR and SP, depending on the nature of the track.[21] OCE informed CNR and SP that an embargo could not be used as a permanent measure and that CNR and SP needed to take steps to deal with the situation.

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[18] CFNR Embargo No. 1-93.

[19] There is some dispute on the record as to whether Bar Ale rejected SP's offer to pay the $100 per car allowance, which offer was memorialized in CNR's November 29, 1993 letter notifying Bar Ale of the embargo. See Bar Ale's Opening Statement, Exhibit M. Bar Ale states, in rebuttal, that it never rejected compensation from SP and would have accepted such payments as partial compensation for the embargo. In its opening statement, Bar Ale stated that SP made two allowance payments.

[20] The parties dispute the necessity of Bar Ale's choice to transload its shipments at Dairymen's facility. Bar Ale indicates that it was the closest facility at which its grain could be unloaded and that the Petaluma team track lacked the necessary equipment for transloading grain into trucks. Defendants argue that the team track at Petaluma is the functional equivalent of the team track that Bar Ale uses at its new Williams facility.

[21] At that time, there was some question whether the track was a spur and, therefore, excepted from the ICC's authority over the abandonment of rail lines.

As stated earlier, when SP entered into the NWP lease with CNR, it was to facilitate the sale of the NWP lines to the Public Entities.[22] On April 11, 1996, SP entered into agreements with the Northwestern Pacific Railroad Authority (NWPRA), a joint powers authority comprised of the Public Entities, and NCRA for the sale of the NWP lines, which was consummated on April 30, 1996.[23] Pursuant to an Interim Trackage Rights Agreement and Assignment Agreement, dated July 22, 1996, between CNR and NCRA, CNR agreed to assign its leasehold interest in the NWP lines to NCRA. The assignment was effective on or about September 12, 1996.[24]

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 11101(a), railroads have a duty to provide service on reasonable request. An embargo of service is permitted as an emergency measure when for some reason a railroad is unable to perform its duty as a common carrier. Although a valid embargo temporarily excuses the duty to provide service on reasonable request, it does not permanently eliminate the common carrier obligation under 49 U.S.C. 11101(a). To be relieved of its common carrier obligation, a railroad must seek discontinuance or abandonment authorization under 49 U.S.C. 10903. Thus, a valid embargo is an appropriate defense to an action for a breach of the common carrier's duty, but an embargo cannot be used by a railroad to unilaterally abandon or discontinue service on a line at its own election.[25]

What constitutes a valid embargo is a fact-specific inquiry to be determined on a case-by-case basis. Embargoes are typically valid if justified by physical conditions affecting safety such as weather and flood damage, and tunnel deterioration, or operating restrictions such as congestion. But to be valid, an embargo must at all times be reasonable. Whether an embargo is reasonable is determined by balancing a number of factors, including the length of the service

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[22] Apparently the government entities did not want to operate the lines and sought to avoid the process of having to locate a qualified operator.

[23] According to UP, SP expected that the sale of the NWP lines would have been consummated sooner, but it was not until early 1995 that the government parties participating in the negotiations finally agreed upon the ultimate purchasing entities and the general terms of the sale.

[24] The acquisition of the lease was approved in North Coast Railroad Authority – Lease and Operation Exemption – California Northern Railroad Company, Northwestern Pacific Railroad Authority, and Golden Gate Bridge, Highway and Transportation District, STB Finance Docket No. 33115 (STB served Sept. 27, 1996).

[25] For an in-depth discussion of embargoes, see GS Roofing Products Co. v. STB, 143 F.3d 387 (8th Cir. 1998), and the cases cited therein.

cessation, the intent of the railroad, the cost of repairs, the amount of traffic on the line, and the financial condition of the carrier. Thus, for example, if the disability that prevented the carrier from performing its duty is eliminated, the carrier is financially able to remedy the disability, and there is no apparent reason why the disability should not be remedied, an embargo may become unreasonable and no longer valid. If an embargo becomes unreasonable, the carrier is no longer excused from its duty to provide service and may be liable to shippers for damages.[26]

Our fact-specific inquiry begins with CNR's initial decision to impose the embargo on the Water Street Line. We find that it was appropriate. Before CNR entered into the lease with SP, Summit/Lynch assessed the condition of the Old Wharf Bridge and found that operations over the bridge should cease until repairs were made. Although Bar Ale disputes that the bridge was unsafe for railroad operations, citing, among other things, the conflicting report from SP's Engineering Department that there was no immediate hazard to continued use of the bridge, it was precisely this conflict in the reports that led to CNR's second engineering study, conducted by Sverdrup, which also recommended that the bridge be closed immediately and confirmed the findings of Summit/Lynch. CNR's engineering studies demonstrate that CNR's safety concerns were justified, and, therefore, that the embargo was initially justified as well. It is well established that a carrier must decide in the first instance whether an unsafe condition exists that prevents it temporarily from providing service, and we typically defer to the operating carrier's opinion on this matter. In this case, the operating carrier's initial determination was eminently reasonable.

The question, then, is whether the embargo became unreasonable at some point. In Overbrook Farmers Union-Petition for Declar. Order, 5 I.C.C.2d 316, 322-23 (1989) (Overbrook), the ICC stated:

> Whether an embargo has been transmuted into an unlawful abandonment revolves largely around the length of the service cessation and intent of the railroad. [Footnote and citation omitted.] Often, the cost of repairs, compared both to the amount of traffic on the line and the financial condition of the carrier, has been critical to the conclusion. Usually, where the embargo is a long one, and the cost of repairs not substantial, invalid embargoes (and consequently unlawful abandonments) have been found.

After examining these additional factors, we conclude that the embargo was at all times reasonable, and was never transmuted into an unlawful abandonment. Although the embargo was a long one, the carriers' intent was clear: they were trying to sell the line for continued rail service. It is the reason given by defendants for the failure to seek regulatory approval to discontinue service or abandon the line. Moreover, according to defendants, it was never intended for Bar Ale to be without service. Substituted service was provided and the shipper was never left

[26] Id.

without a transportation option. Instead, defendants say, SP was trying to preserve all options available to the prospective purchasers of the line and accommodate their wishes.[27] Although, technically, discontinuance authority should have been sought,[28] it would not have changed anything for Bar Ale, whose intent was also clear—to relocate from Petaluma to Williams. In view of the ongoing negotiations for the sale of the NWP lines, which took longer than expected, it was reasonable that the carriers did not pursue abandonment or discontinuance authority.

Finally, in balancing the relevant factors to determine whether the embargo was at all times reasonable, we must take into account the cost of repairs in relation to both the amount of traffic generated by Bar Ale and the financial condition of the carriers. Rehabilitation of the Old Wharf Bridge would have cost $250,000 while revenue from Bar Ale's traffic was only about $28,400 a year. Neither CNR, a Class III carrier, nor SP, whose precarious financial condition during the term of the embargo was well known,[29] could afford the substantial rehabilitation expense during negotiations to sell the line given the limited amount of traffic and revenue derived from Bar Ale, the sole shipper served via the Water Street Line.[30]

Given all of the circumstances, we find that the carriers made an effort to maintain service and at the same time ensure safe operations, that this was a lawful embargo, and that the embargo was at all times reasonable. Accordingly, Bar Ale's complaint will be denied.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

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[27] UP states that, throughout the negotiating process, the various acquiring government entities insisted that SP keep the NWP lines intact and not abandon any segment. As previously noted (supra note 22), the government entities did not want to operate the lines and sought to avoid the process of having to locate a qualified operator.

[28] Also, technically, CNR should have renewed its embargo, which automatically expired under the rules of the AAR after November 17, 1994. The AAR's embargo rules are designed to provide notice to shippers, carriers, and the public that a particular track has been closed due to the temporary inability to operate over it. An embargo expires one year after its effective date, unless canceled earlier. (AAR Circular TD-1, effective May 1, 1992.) Here, notice was not an issue because Bar Ale knew about the status of the track.

[29] See generally Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996).

[30] CNR estimates that the cost of rehabilitating the Old Wharf Bridge was approximately 10 times the annual revenues that it earned from the traffic.

It is ordered:

1. The complaint is denied, and this proceeding is discontinued.

2. This decision is effective on August 19, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary